PRIVY COUNCIL REPORT

MOH SENG REALTY (PRIVATE) LTD. v. H.L. BANNERJI

[P.C. (Lord Roskill, Lord Brandon of Oakbrook, Lord Griffiths, Sir Denys Buckley & Sir Owen Woodhouse) July 29 & August 16, 1985]

[Privy Council Appeal No. 40 of 1983]

Landlord and Tenant – Lease – Lease providing for renewal and rent increase proportionately to increase in assessment – Landlord claiming increased proportionate rent – Tenant disputing claim – Application for renewal of lease refused – Application by tenant for specific performance disallowed – Appeal.

Interpretation – Lease providing for renewal and rent increase proportionately to increase in assessment – Meaning of "proportionately" and "assessment"

In this case the appellant's predecessor in title had leased the premises to the respondent for a term of ten years at the monthly rental of $110.00. There was a proviso which stated that "if the assessment on the said premises shall at any time within the said period be increased or decreased then and in such event the said rent shall also be proportionately increased or decreased accordingly". The lease contained an option to renew, making the lease a perpetually renewable lease. Towards the close of the first ten year period the respondent wrote to the landlords to exercise his option to renew but despite repeated requests the landlords never granted a new lease. However the respondent remained in possession of the premises and continued to pay the rent. In 1974 the annual value of the premises was increased from $1320 to $2880 and the tax payable by the landlord was thus increased from $475.20 a year to $1036.80 a year an increase of 118.18%. The landlords thereupon wrote to the respondent notifying him of the increase in annual value and demanding an increased rent of $240/- a month. The figure of $240 was arrived at by applying the same percentage increase of 118.18 that had been applied to the tax assessed on the premises. The respondent disputed this demand and offered to pay a rent of $156.80 a month, a sum arrived at by adding to the monthly rent $110/- the sum by which the monthly payment tax had increased namely $46.80. For the next three years the respondent sent a monthly cheque for $156.80 in payment of the rent. The landlords never accepted the cheques and never cashed any of them but the respondent was allowed to remain in the premises. Subsequently in 1977 the respondent purported to exercise his option to be granted a renewal of the lease but the landlords refused to grant a new lease. The respondent thereupon brought an action for specific performance of the agreements to grant him successive periods of ten years in respect of the property. The landlords for their part commenced proceedings claiming possession of the property. The proceedings were consolidated and tried in the High Court. Chua J. held that on the true construction of the lease the landlords were entitled to a monthly rent of $240 and as the respondent had failed to pay that rent he was not entitled to exercise the option for renewal and that the landlords were therefore entitled to possession – see [1983] 1 M.L.J. 18. The respondent appealed and the Court of Appeal allowed the appeal holding that on the true construction of the proviso the rent was to be increased by no more than the amount of increase in the property tax. It was therefore held that the respondent had validly exercised his option for renewal and an order for specific performance was made – see [1983] 2 M.L.J. 18. The appellants appealed to the Privy Council.

Held: (1) the Court Appeal had rightly held that the words "the assessment" referred not to the annual value of the premises as had been held by the judge in the High Court but to the amount of the rates or taxes to be paid on the premises which is the product of the application of the percentage rate of tax on annual value. However the fact that the judge had based his construction upon the annual value rather than the amount of the tax made no difference to the result in this case because the rate of tax had remained a constant percentage throughout the relevant period and it was only the annual value that had altered;

(2) giving the word "proportionately" its due weight it is clear that the clause in the lease was providing that the increase in the rent shall be proportional to the increase in the tax, that is, each shall increase by the same ratio or percentage;

(3) the landlord's construction of the rent clause was correct and therefore the respondent was not entitled to exercise his option for renewal and the order of the trial judge should therefore be restored;

(4) in the circumstances of this case it was quite impossible to spell out any promise on the fact of the landlords that they would not insist on the payment of the correct rent as a condition precedent to the exercise of the option to renew the lease. The point was not taken up in either of the lower courts and there is no substance in it.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Robert Reid Q.C. (*Daniel Hockborg* with him) for the appellant.

Alan Sebestyen for the respondent.

Cur. Adv. Vult.

Lord Griffiths (delivering the Judgment of the Board): This appeal turns upon the construction of the proviso in the rent clause of a lease dated July 23, 1957 granted by the appellant's predecessor in title Chin Cheng Realty (Private) Limited to the respondent Dr. Hirendra Lal Bannerji. At the conclusion of the hearing their Lordships allowed the appeal and indicated that they would give their reasons later. This they now do.

By clause 1 of the lease premises known as number 322-F Changi Road Singapore were let to Dr. Bannerji:-

"1. TO HOLD the demised premises unto the Tenant for the term of TEN years from the 1st day of August,

1957, PAYING THEREFOR Monthly during the said term the rent of Dollars ONE HUNDRED AND TEN ($110.00) the first payment thereof to be made on the 1st day of August, 1957, and subsequent payments to be made between the 1st and the 7th day of every English Calendar month. PROVIDED However that if the assessment on the said premises shall at any time within the said period be increased or decreased then and in such event the said rent shall also be proportionately increased or decreased accordingly."

The lease contained an option to renew expressed in the following terms:-

"3(c) That the Landlords will on the written request of the Tenant made three calendar months before the expiration of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the Tenant hereinbefore contained at the expense of the Tenant grant to him a lease of the demised premises for a further term of TEN years from the expiration of the said term at the same rent and containing the like covenants and provisoes as are herein contained including the present covenant for renewal.

There is no dispute that the lease is, under Singapore law, a perpetually renewable lease.

By clause 2(c) the tenant covenanted:-

"To pay all City Council charges for electricity, gas and water supplied to the said premises;"

By clause 3(b) the landlord covenanted:-

"To pay all rates taxes assessments and outgoings payable by law in respect of the demised premises, other than those referred to in Clause 2(c) above;"

The first ten-year term passed uneventfully. Dr. Bannerji, the tenant, regularly paid the rent of $110 a month and the charges for electricity, gas and water and the landlords paid the rates which were at the commencement of the term $39.60 a month a sum assessed by taking 36% of the annual value of the premises fixed by the Municipal Commissioners at $1320 per annum pursuant to the Municipal Ordinance. In 1961 a property tax was substituted for the rates by the Property Tax Act (Cap. 144); but in practice this made no difference to the landlords' liability because the property tax was assessed in the same way as the rates namely at 36% of the annual value which remained unchanged.

As the first ten-year term drew towards a close Dr. Bannerji wrote to the landlords to exercise his option to renew the lease for a further ten years. Despite repeated requests by Dr. Bannerji and his solicitors the landlords never granted a new lease. However, Dr. Bannerji remained in possession of the premises and continued to pay the rent and it is conceded that Dr. Bannerji was contractually entitled to the grant of a second ten-year lease on the expiry of the old lease on July 31, 1967.

As the result of a revaluation of the premises in 1974 the annual value was increased from $1320 to $2880. The rate of tax remained at 36% and the tax payable by the landlord was thus increased from $39.60 a month to $86.40 a month expressed in annual terms an increase from $475.20 a year to $1036.80 a year an increase of 118.18%.

On March 15, 1974 the landlords wrote to Dr. Bannerji notifying him of the increase in annual value from $1320 to $2880 and demanding under clause 1 of the lease an increased rent of $240 a month with effect from March 11, 1974. The landlords had arrived at the figure of $240 a month by applying to the rent the same percentage increase of 118.18 that had been applied to the tax assessed on the premises.

Dr. Bannerji disputed this demand and offered to pay a rent of $156.80 a month a sum arrived at by adding to the monthly rent of $110 the sum by which the monthly property tax had increased namely $46.80.

For the next three years Dr. Bannerji sent a monthly cheque for $156.80 in payment of the rent. The landlords never accepted the cheques as payment of the rent and never cashed any of the cheques. Somewhat astonishingly the landlords seem to have been content to let Dr. Bannerji remain in the premises for the next three years without receiving any payment for them.

Matters came to a head however when Dr. Bannerji wrote to the landlords on April 22, 1977 purporting to exercise his option to be granted a further ten-year lease from July 31, 1977. The dispute over the correct rent was revived in correspondence between the parties, the landlords refused to grant a new lease and Dr. Bannerji commenced an action in the High Court on July 27, 1977 claiming specific performance of the agreements to grant him two successive terms of ten years in respect of the property. The landlords for their part commenced proceedings in the subordinate court on September 29, 1977 claiming possession of the property.

The proceedings were consolidated and tried

by Chua J. The learned judge held that on the true construction of the lease the landlords were entitled to a monthly rent of $240 and as Dr. Bannerji had failed to pay that rent he was not entitled to exercise the option contained in clause 3(c) of the lease and that the landlords were therefore entitled to possession.

The Court of Appeal allowed an appeal by Dr. Bannerji holding that on the true construction of the proviso the rent was to be increased by no more than the amount of the increase in the property tax. As this was the construction for which Dr. Bannerji had contended and in accordance with which he had tendered his rent the Court of Appeal held that he had validly exercised his option and made an order for specific performance of the execution of a lease for a term of ten years from August 1, 1977 to July 31, 1987 on the same terms and conditions as in the 1957 lease.

Both before the judge and the Court of Appeal the landlords raised other grounds upon which they oppose the grant of a new lease but in the light of that which their Lordships find to be the true construction of this lease it is unnecessary to consider those additional grounds.

It is here convenient to set out once more the proviso which contains the language crucial to this appeal:-

> "1. . . . PROVIDED However that if the assessment on the said premises shall at any time within the said period be increased or decreased then and in such event the said rent shall also be proportionately increased or decreased accordingly."

It was accepted before their Lordships that the Court of Appeal had rightly held that the words "the assessment" referred not to the annual value of the premises as had been held by the judge but to the amount of the rates or taxes to be paid on the premises which is the product of the application of the percentage rate of tax to the annual value. The fact that the judge had based his construction upon the annual value rather than the amount of tax made no difference to the result in this case because the rate of tax had remained a constant percentage throughout the relevant period and it was only the annual value that had altered. But if the percentage rate of tax altered as it might in the future the judge's approach would be invalidated.

The Court of Appeal having concluded that the increased rental should be based on the increased property tax to be paid by the landlords said:-

> "We are of the view that the proviso, to all intents and purposes, is in the nature of an indemnity clause ... The proviso relating to an increase of assessment was introduced by the parties into the 1957 lease to re-imburse the 'landlords' for any increased assessment they might thereby have been called to pay. Similarly with regard to a decrease in the assessment so that in this unlikely event the 'tenant' would get the benefit of such a reduction."

With all respect to the view of the Court of Appeal their Lordships are unable to accept this construction for its gives no weight whatever to the word "proportionately". Giving this word its due weight it is in their Lordships' view clear that the clause is providing that the increase in the rent shall be proportional to the increase in the tax *i.e.* that each shall increase by the same ratio or percentage. So if as in this case the tax increases from $475.20 a year to $1036.80 a year which is a ratio of 11:24 or 118.18% the same ratio or percentage has to be applied to the rent of $1320 per annum which produces $2880 per annum.

If it had been the intention that the rent should have been increased or decreased by the same amount as any increase or decrease in the tax it would have been simple to say so in the proviso and there would have been no need to use the word "proportionately". It would however have been a somewhat surprising provision to have found in a perpetually renewable lease for it would have meant that the landlord was content to let the premises for an indefinite and probably lengthy number of years without any provisions for any increase in the profit element of the rent, although experience teaches that property values are likely to rise over the course of the years. On the other hand if proper weight is given to the word "proportionately" the clause operates as a form of rent review or escalation clause tying the rent to the tax which may broadly be expected to rise in line with increased property values.

In seeking to uphold the Court of Appeal's construction Mr. Sebestyen relied upon the definition of "proportional" in the *Concise Oxford Dictionary* which reads "1. In due proportion, corresponding in degree or amount" and suggested that this supported the view that "proportionately" was used in the sense of an increase of rent of a corresponding amount to the increase in the tax which he submitted meant an increase of the rent of the same amount as the increase in the tax. Their Lordships doubt whether the editor intended to convey that as a possible meaning of the word

"proportionately" and are satisfied that it is not its natural meaning or that which it bears in this proviso.

Their Lordships are satisfied that the landlords' construction of the rent clause is correct from which it follows that Dr. Bannerji was not entitled to exercise his option for a renewal of the term as he had failed to pay the correct rent for a period of three years immediately before he purported to exercise the option and thus had failed to fulfil the terms of clause 3(c) of the lease.

Although the point was not taken with any clarity in the respondent's case their Lordships heard a submission on behalf of Dr. Bannerji that the landlords were estopped from relying upon the failure of Dr. Bannerji to pay the increased rent.

The basis of this submission was that the landlords had taken no action to enforce payment of the increased rent between the date when they first demanded it in March 1974 and the date upon which Dr. Bannerji purported to exercise his option in April 1977. Their Lordships are satisfied that the fact that the landlords did not take steps to enforce their legal right to payment of the increased rent cannot amount to an estoppel in the circumstances of this case. At all times Dr. Bannerji knew that the landlords contended that the correct rent was $240 a month and he knew that they were refusing to accept his cheques for the lesser amount. In these circumstances it is quite impossible to spell out any promise on the part of the landlords that they would not insist upon the payment of the correct rent as a condition precedent to the exercise of the option as required by clause 3(c) of the lease. It would not appear that this point was taken in either of the lower courts and their Lordships are satisfied there is no substance in it.

For these reasons their Lordships allowed the appeal, restored the order of Mr. Justice Chua and directed the respondent to pay the appellant's costs here and in the courts below.

Appeal allowed.

Solicitors: *Denton Hall & Burgin; Collyer-Bristow.*

SINGAPORE REPORTS

JUSUF KALIMAN & ANOR. v. OUTRAM REALTY (PTE.) LTD.

[O.C.J. (Wee Chong Jin C.J.), June 18, 1984]

[Singapore – Summons in Chambers No. 2699/82 in Suit No. 1082 of 1982]

Contract – Agreement for sale and purchase of land – Housing developers failing to give Notice to complete on appointed date – Claim by purchasers for liquidated damages – Claim allowed despite waiver by purchasers – Housing Developers' (Control and Licensing) Act 1965 – Housing Developers Rules 1965, r.16 – R.S.C. 1970, O.81.

Housing Developers – Failure to give Notice to complete on appointed date – Claim by purchasers for liquidated damages – Claim allowed despite waiver by purchasers – Housing Developers (Control and Licensing) Act 1965 – Housing Developers Rules 1965 r. 16.

The defendants failed to give Notice of Completion on December 31, 1976 which was the date appointed by the Controller of Housing on or before which the notice to complete should be given by the Vendor under Clause 12 of the sale agreements. The defendants gave notice to complete the sale and purchase on March 11, 1981. Pursuant to the said Clause the plaintiffs claimed against the defendants the sum of $130,351.50 as liquidated damages. The defendants contended that the plaintiffs had expressly waived their right to liquidated damages in writing and by taking possession of the properties.

Held, allowing the plaintiffs' claim: there is no defence or no fairly arguable point to argue on behalf of the defendants.

[**Editorial Note**: The defendants appealed against this judgment and were given leave to defend – Civil Appeal No. 8 of 1984. No grounds of decision were given.]

SUMMONS IN CHAMBERS.

Dennis Tan Jui Kwang for the plaintiffs.
Lee Kim Siang for the defendants.

Cur. Adv. Vult.

Wee Chong Jin C.J.: The plaintiffs, in an Order 81 application, claim, *inter alia*, the sum of $130,351.50 as liquidated damages as specified in two contracts of sale of two shop units 65 and 67 situated on the ground floor of Pearl Centre. The plaintiffs are the purchasers and the defendants are the vendors of these two shop units. The relevant clause of the sale agreements is Clause 12 which reads:–

"12. The sale and purchase shall be completed at the Office of the Vendor's Solicitors M/s. Lee Kim Siang & Co. of